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Donald W. Dowd

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## Symposium The Sentencing Controversy: Punishment and Policy in the War Against Drugs

INTRODUCTION  
WHAT FRANKEL HATH WROUGHT

DONALD W. DOWD\*

THE early 1970s was a period of uneasy consensus on the goals and procedures of sentencing.<sup>1</sup> Most states and the federal government had adopted individualized sentencing giving wide discretion to the sentencing judge and if a sentence of imprisonment was imposed wide discretion to a parole board.<sup>2</sup> Individualized sentencing emphasized the rehabilitative goal.<sup>3</sup> Of course, the other goals of sentencing were not ignored.<sup>4</sup> Quite apart from rehabilitation, a maximum and a minimum usually not more than one half

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\* Professor of Law, Villanova University School of Law.

1. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 3 (1985). Prior to the 1970s, a consensus was evident on the goals of sentencing. *Id.* Today, this agreement no longer exists. *Id.*

2. *Id.* at 20-21. Detailed standards for sentencing are a recent development. *Id.* at 20. Typically, other than statutory maximums for sentences "[t]here were few other limits placed on sentencing judges' discretion, and almost no guidance provided for the exercise of that discretion." *Id.* Pennsylvania and Minnesota were exceptions to this general rule. *Id.* at 21. Minnesota led the states in implementing the idea of a sentencing commission. *Id.* Minnesota's legislature created a Sentencing Guidelines Commission in 1978 and the guidelines were completed in 1980. *Id.* Shortly after Minnesota's guidelines became effective, Pennsylvania followed Minnesota's lead and established its own sentencing commission. *Id.*

3. *Id.* at 3. Individualized sentencing allows for consideration of the offender's needs and treatment when choosing a sanction. *Id.* This consideration is aimed at rehabilitating the offender. *Id.*

4. Ami L. Feinstein et al., *Federal Sentencing*, 30 AM. CRIM. L. REV. 1079, 1082. While there may be agreement that the goal of the criminal justice system is to control crime, "scholars dispute whether the ultimate goal of punishment is to provide just retribution for a given crime, to deter future criminals, to incapacitate dangerous offenders, or to rehabilitate wayward citizens." *Id.*

the maximum sentence could be imposed that reflected the judge's opinion of the seriousness of the offense and thus reflected the retributive goal.<sup>5</sup> To emphasize retribution, however, smacked of irrational revenge and was in bad odor. As to the deterrence goal, the severity of the maximum sentence might frighten some of those disposed to crime and deter their actions.<sup>6</sup> But, it was difficult to show in most cases how or how much offenders altered their behavior because of sentencing practices.<sup>7</sup> Another goal in sentencing might be incapacitation, that is to remove dangerous offenders from society for public safety.<sup>8</sup> Any sentence of imprisonment achieves this goal for the term of imprisonment. To select a sentence that would extend imprisonment or imprison those who otherwise might not be imprisoned on this basis would, however, require the judge to predict future conduct rather than punish past conduct. Judges were uncomfortable in placing too much reliance on this goal. They were wary of their gifts of prophecy.

The assumptions behind the consensus on individualized sentencing with its rehabilitative goal were under attack from all sides.<sup>9</sup> On the left, it was asserted that the exercise of discretion by the judges and the parole boards had resulted in unequal justice, oppressing the poor and minority races.<sup>10</sup> In 1971, the American Friends Service Committee issued an influential report "The Struggle For Justice" which contained a scathing criticism of discretion in

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5. Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1941 (1988). The concepts of deterrence and rehabilitation, while the prevailing view during the 1950s, have seen the emphasis shift recently toward a model of punishment based on retribution and incapacitation. *Id.* However, no single purpose of punishment has "reigned supreme." *Id.*

6. VON HIRSCH, *supra* note 1, at 7-9. The theory behind the deterrence school was that "it is still a fundamental fact of social life that the risk of unpleasant consequences is a very strong motivational factor for most people in most situations" and, therefore, the threat of sanctions ensured compliance. *Id.* at 7-8.

7. *Id.* at 95. The difficulty in assessing the deterrent effect of penalties is still present. *Id.*

8. *Id.* at 24-25. The theory behind incapacitation is that "the prison prevents offenders from being able to commit further crimes while confined." *Id.*

9. Martin L. Forst, *Sentencing Disparity: An Overview of Research and Issues*, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 9, 18-19 (Martin L. Forst ed., 1982). The assault on the individualized sentencing model came from various sources. *Id.* at 18. The attacks came from "academics, the judiciary, correctional administrators, a wide spectrum of politicians, and even prisoners." *Id.*

10. *Id.* at 17-18. Critics began to question the fairness and justice of individualized sentencing. *Id.* at 18. The concern centered on sentencing inequalities that may have resulted from biases based on race, religion, social class, nationality "and similar factors not related to the aims of the rehabilitative philosophy." *Id.* at 17. Supporters of individualized sentencing, however, argued that the individual differences between offenders justifiably related to correctional goals. *Id.* at 18.

sentencing and in parole and called for its complete abolition.<sup>11</sup> The assumption behind this reform was that the poor and people of color would then enjoy the justice that had been available to the rich and that had been given to white citizens.<sup>12</sup> After sorrowfully noting the failure of another Quaker-sponsored reform, the report stated:

This is not the only example in the field of criminal justice of a reform that backfired completely. Out of the best intentions in the world can grow an increase in human misery. We will be mindful of this as we examine and propose changes in the institutions of human justice.<sup>13</sup>

One wonders what after almost a quarter of a century the authors now think of this "reform" of abolishing judicial discretion.<sup>14</sup>

On the right, critics called for more and more mandatory sentences to punish and deter.<sup>15</sup> Andrew von Hirsch urged that the only real justification for different punishments is the seriousness of the crime being punished.<sup>16</sup> Retribution was advocated not as re-

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11. AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* 124-44 (1971). The report advocated abandoning the rehabilitative approach and applying a uniform approach. *Id.* at 143. The problem with the discretionary model was that discretion allowed the principles of justice and legality, which depend on the uniform application of rules, to be twisted. *Id.* at 125. A uniform approach would not deal generally with an individual's character but "only with a narrow aspect of the individual, that is, his [or her] criminal act or acts." *Id.* at 145.

12. *Id.* at 15-16.

13. *Id.* at 19. The failed reform involved an attempt to alter the basic structure of the penal system. *Id.* at 18. Philadelphia Quakers in an effort to enable prisoners to reform themselves built a prison in which the inmates were kept in total solitary confinement. *Id.* While the approach was never fully implemented due to cost restrictions, there was little evidence that it aided in reforming the prisoners. *Id.*

14. The current controversy over the disparity between the mandatory minimum sentences imposed for crack cocaine and powdered cocaine illustrates how discretionary sentencing can have a devastating effect on minorities and the poor. For a discussion of the disparity between the mandatory minimum imposed for crack cocaine and powdered cocaine, see Stewart Dalzell, *One Cheer for the Guidelines*, 40 VILL. L. REV. 317, 327 n.53 (1995).

15. Forst, *supra* note 9, at 21. Advocates of law and order sought an end to discretionary sentencing which allowed judges and parole boards to be "soft on crime." *Id.* Critics on the right began looking for a means to control decision-makers and reduce disparity by preventing the early release of dangerous criminals. *Id.*

16. VON HIRSCH, *supra* note 1, at 171. According to von Hirsch, selecting a rationale for sentencing depends on "underlying assumptions" about crime control. *Id.* He argues that punishments based on the gravity of crimes recognizes offenders as persons capable of choice and accountable to their degree of fault. *Id.* Longstanding traditions of choice and culpability in criminal law are consistent with this concept. *Id.*

venge but as "just deserts."<sup>17</sup> James Q. Wilson and others insisted that incapacitation should be a chief goal.<sup>18</sup> They claimed that we could identify the kind of offender who accounts for most of dangerous street crime and insure public safety by sentencing on the basis of whether the offender could be so classified.<sup>19</sup> Moreover, the whole concept of rehabilitation was put into question in a major study reviewing rehabilitative programs in prisons by Lipton, Martinson and Wilks which suggested that "nothing works."<sup>20</sup>

Even those who supported individualized sentencing and had faith in the rehabilitative goal were concerned with the gross and irrational disparity that too often occurred.<sup>21</sup> They insisted that the problem could be solved not by abandoning discretion but by structuring the exercise of discretion more carefully.<sup>22</sup> They argued that more information should be made available to the judge through better pre-sentence reports and sentencing hearings. Legislation should set forth the alternatives available to the judge and some

17. Peter A. Ozanne, *Judicial Review*, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 177, 195 (Martin L. Forst ed., 1982). The contemporary version of retributivism is known as "just deserts." *Id.* Under the theory of "just deserts," the factors relevant to the sentencing decision include the circumstances of the crime relating to its severity and the prior record of the offender. *Id.* at 180-81.

18. VON HIRSCH, *supra* note 1, at 8-9, 116. Incapacitation as a goal of sentencing is based upon the belief that by removing from circulation for a certain period of time those persons convicted of crimes an incapacitative effect would result. *Id.* at 116. Those persons imprisoned would be prevented from offending while in prison. *Id.* Wilson was a leading advocate of this strategy. *Id.* Wilson asserted that since most major felonies are perpetrated by a small number of repeat offenders prison sentences would remove the frequently convicted felons from circulation and benefit society. *Id.* at 8.

19. *Id.* at 8-9. Wilson and others espousing the incapacitation theory argued that those who repeatedly committed felonies "sooner or later are caught and convicted." *Id.* at 8. Individual predictions, therefore, would not be involved in such an analysis. *Id.* Those imprisoned would be repeat offenders and would eliminate the concern present with individualized sentencing about overlooking actually dangerous convicts. *Id.*

20. DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 3 (1975). The authors of the study stated three purposes for which their information could be used. *Id.* at 4. First, the study showed that several assumptions about the prison system accepted on an "a priori basis" may not in fact be true. *Id.* Second, the study was to serve as an information base. *Id.* Third, the survey reflected the need for new ideas in the area of corrections. *Id.*

21. Forst, *supra* note 9, at 21. Even "liberals" were concerned about reducing disparity. *Id.* Both judges and penologists have expressed considerable skepticism about the value of rehabilitation. Ogletree, *supra* note 5, at 1941.

22. Forst, *supra* note 9, at 20. While accepting the validity of individualized sentencing, many legal scholars have suggested "piecemeal measures" to deal with the disparity in sentencing. *Id.* Suggested measures include the formation of sentencing institutes and sentencing councils. *Id.*

criteria for selecting one or more of these alternatives. The judge should state the reasons for his or her sentence and the sentence should be reviewable not only on its legality, but on its reasonableness.<sup>23</sup> In 1972, a committee of the Pennsylvania Bar Association chaired by Judge Edmund Spaeth drafted legislation to accomplish many of these reforms which became the Sentencing Procedure Act which largely followed the procedures adopted in the Model Penal Code.<sup>24</sup> Although parts of this law were “suspended” or, as some of the legislators and drafters thought, gutted by the Pennsylvania Supreme Court, the state remained committed to individualized sentencing.

Also in 1972, a more radical and novel reform was advocated by Judge Marvin Frankel in his book *Criminal Sentences: Law Without Order*.<sup>25</sup> After a critical review of the inadequacies of discretionary sentencing and suggested reforms, he called for a Sentencing Commission whose members would be drawn from a wide spectrum of those concerned with criminal punishments, even ex-offenders.<sup>26</sup> It would have a professional staff, and like other administrative agencies could develop policies and adopt “rules” which would control sentencing discretion.<sup>27</sup>

On May 20 and 21 of 1976, the Institute for Correctional Law held a conference at Villanova University School of Law entitled “Sentencing in Pennsylvania” to consider what steps the state should take to improve sentencing.<sup>28</sup> As Director of the Institute, I invited legislators, judges, prosecutors, defense counsel, administrators and officers from correctional departments and boards of probation and parole, scholars, concerned citizens from non-governmental agencies and ex-offenders to come and exchange

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23. *Id.* Proposed changes to the individualized justice model included a requirement that a judge state the reasons for the sentencing decision as well as appellate review of sentences. *Id.*

24. 18 PA. CONS. STAT. ANN. §§ 1301-1386 (1972) (current version at 42 PA. CONS. STAT. ANN. §§ 9701-9781 (1982 & Supp. 1995)).

25. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 3 (1973). Judge Frankel devotes the second half of his book to laying out his proposed remedies and directions of hope. *Id.* at 53.

26. *Id.* at 120. Judge Frankel envisioned a sentencing commission which would be composed of “lawyers, judges, penologists, and criminologists” and others with some knowledge of prisons and sentencing. *Id.*

27. *Id.* at 122. Judge Frankel noted the lack of sentencing in law school curriculum, the lack of training on sentencing issues for judges and the absence of any guidelines to assist judges in eliminating disparities. *Id.* at 12-15. The proposed commission would formulate rules for the implementation of sentences and ensure that the rules were enforced effectively and objectively. *Id.* at 121-22.

28. *Sentencing in Pennsylvania*, 1976 INST. CORRECTIONAL LAW iv.

their ideas — the very people who could serve on Judge Frankel's Sentencing Commission.<sup>29</sup> Judge Frankel, himself, gave the closing remarks.<sup>30</sup> After deploring the cry from politicians for harsh mandatory or mandatory minimum sentences and the reluctance of judges to accept review of their sentences, he returned to the idea of a Sentencing Commission and sentencing guidelines.<sup>31</sup> The idea had matured into a bill, S. 2699, which had been introduced by his new disciple Senator Edward Kennedy with broad bi-partisan support.<sup>32</sup>

Judge Frankel enthusiastically described the advantages of this bill. He said:

It would provide for appellate review. But most importantly, for my purposes here and for my purpose to tell you what might be of interest in the Federal sphere, it would create a Commission on Sentencing. This would be a full-time Commission . . . .

Its most basic function—which is why I think well of it and hope it comes to pass—is to do something which no official group or agency has really ever done, and that is, to pay sustained, full-time, steady, unepisodic, unpublicized attention to the problems of sentencing. This would be its field. The ways it would pay attention include, among others, research, gathering of information, dissemination of information —all matters of the first consequence in the Federal courts. I have to make a special investigation in my building, where there are 25 judges, to find out what other people have given this year

29. *Id.* at iii-iv.

30. *Id.* at 222-37. Judge Frankel discussed in his remarks the punitive character of the American system of sentencing as well as the discretion afforded all those involved in the criminal justice. *Id.* at 224, 226. According to Judge Frankel, discretion is exercised from the cop on the beat to the sentencing judge to the parole board. *Id.* at 226.

31. *Id.* at 231-32, 227-30. Judge Frankel acknowledged that sentencing is a very "delicate, sensitive and emotional business." *Id.* at 228. While avoiding an attack on judges, Judge Frankel believes that to an extent judges' resistance to appellate review stems from jealousy in guarding their occupational pleasures and prerogatives. *Id.* He notes that, at least in the Federal system, the resistance to appellate review comes from the appellate judges. *Id.* at 229. Whether it stem from an avoidance of extra work or the avoidance of a task with little glory, appellate judges avoided the role. *Id.* at 229-30.

32. *Id.* at 233. The bill had a variety of co-sponsors. *Id.* Other senators supporting the legislation included individuals from left to right on the political spectrum including Senators Abersk, Hruska and McClellan. *Id.* The Administration led by President Ford supported the legislation as well. *Id.*; see S. 2699, 94th Cong., 1st Sess. (1975).

for mail fraud, and so on. To me it's a subject of interest, but obviously, it's not of interest to other Federal judges, because it's not something that is regularly distributed, and I'm told it's not even regularly asked for, because everybody does his own thing about sentencing, and whatever the other fellow does is his business.

. . . .

For me, the beauty of this Commission—like the beauty of other full-time agencies—is that it would have ongoing concern with these things. . . . These guidelines would have a kind of presumptive force under this bill. That is to say, very briefly, they are tied in with the provision for appellate review, and the statute would provide that if a sentence was within the guidelines of the statute itself, and within any guidelines that came to be promulgated by this Commission, then it would be reversible on appeal, only if it was clearly unreasonable.

That's the scope of review for a sentence within the guidelines. It would leave the sentencing judge free to sentence outside the guidelines, and of course, he would explain why. And then it provides that a sentence outside the guidelines is reversible if it is unreasonable. So it is more subject to reversal if it's outside the guidelines. It must be found merely to be unreasonable. If it's within the guidelines, it can only be reversed if it is clearly unreasonable . . . .<sup>33</sup>

Judge Frankel then passed out copies of the bill with missionary zeal.<sup>34</sup> He found many converts, chief of whom was Representative (now Judge) Anthony J. Scirica.<sup>35</sup> As Judge Frankel was to be father of the United States Sentencing Commission, Judge Scirica was to be the father of the Pennsylvania Sentencing Commission.<sup>36</sup>

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33. *Id.* at 233-36.

34. *Id.* at 236. In preparation of his appearance, Judge Frankel procured copies of the bill from Sen. Kennedy's office. *Id.* The bills were made available to interested participants. *Id.*

35. *Id.* at 201-02. Representative Scirica questioned how to remove the disparity that results from unnecessary discretionary power. *Id.* at 202. While acknowledging he may prefer on a given issue to follow the dictates of the Supreme Court procedural rules committee, Representative Scirica felt the issue of sentencing was too important not to be treated to the legislative process. *Id.* at 200-01.

36. Judge Scirica was a proud father even before Judge Frankel's brain-child was born. Pennsylvania established a Sentencing Commission in 1978 and enacted its first guidelines in 1982. See 42 PA. CONST. STAT. ANN. §§ 9701-9781 (1982 & Supp. 1995); 204 PA. CODE ch. 303 (1994) (Sentencing Guidelines).



Sentencing commissions and sentencing guidelines seemed to offer something for everyone. A commission could issue guidelines protecting minorities and the poor from discrimination and assuring equal justice. It could consider the concerns of those who advocated a "just deserts" model by making sure that the guidelines focused on the circumstances of the crime not just the criminal. With its professional expertise, it could examine the claims of those who favored selective incapacitation by scientifically determining which offenders were most likely to create a continuing danger to the public. Because the commission would consider the minimum sentence appropriate for each offence in setting guidelines, there would be no need for statutory minimum sentences to control too lenient judges.

Less than a month after the conference, Judge Frankel had every reason to redouble his efforts to push for a Sentencing Commission and guidelines. He was faced with sentencing a sixty-four year old rabbi in a 1.2 to 2.5 million dollar Medicare and tax fraud nursing home case.<sup>37</sup> After a extensive sentencing hearing, Judge Frankel sentenced Rabbi Bergman to four months imprisonment.<sup>38</sup> In a sentencing memorandum, he carefully stated the reasons for this sentence.<sup>39</sup> The sentence was widely criticized. The Special Prosecutor Charles J. Hynes protested by stating:

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37. *United States v. Bergman*, 416 F. Supp. 496, 498 (S.D.N.Y. 1976). The rabbi, Bernard Bergman, pled guilty to two counts of an 11-count indictment resulting from an investigation into Medicaid fraud. *Id.* at 497-98. The defendant was the subject of an investigation into fraudulent claims for Medicaid funds in New York nursing homes. *Id.* at 498. The defendant pled guilty to count one of the indictment in which he confessed to knowingly and wilfully participating in a scheme to defraud the United States through the presentation of padded claims for payments under the Medicaid program to the defendants nursing home. *Id.* The defendant also admitted to participating in the false filing of a partnership return. *Id.* The return failed to list people who had bought partnership interests from the defendant in his nursing homes, had paid for such interests and had made certain capital withdrawals. *Id.*

38. *Id.* at 497.

39. *Id.* at 498. While acknowledging that the conspiracy to defraud for which the defendant pled guilty was not the gravest of nursing-home wrongs, Judge Frankel noted that the sentence was "imposed for two federal felonies including, as the more important, a knowing and purposeful conspiracy to mislead and defraud the Federal Government." *Id.* at 498. Judge Frankel asserted that two sentencing considerations demanded a prison sentence in this case. *Id.* at 499. First, the aim of general deterrence and discouraging others likely to commit similar crimes supported a term of imprisonment. *Id.* Second, the related concern that a lesser penalty would "depreciate the seriousness of the defendant's crime" supported Judge Frankel's sentence. *Id.* Judge Frankel in support of his sentence stated that "[t]he course of justice must be sought with such objective rationality as we can muster, tempered with mercy, but obedient to the law, which, we do well to remember, is all that empowers a judge to make other people suffer." *Id.* at 503.

I am extraordinarily disappointed by the sentence that Dr. Bergman received today. One wonders whether essential justice has been accomplished when a man such as Bernard Bergman is given this kind of sentence.

I am deeply troubled and discouraged by the cynicism generated by what the people consider to be special justice for the privileged.

I am also saddened about what our elderly must think—those who lived in one of Bernard Bergman's nursing homes. I believe they must feel abandoned and alone once again.

As for those destined to spend time in a nursing home in later years—one out of every five elderly Americans will do so—what are they to think?

Our continued investigation into the nursing home industry may, I fear, be adversely affected by this sentence. Concerned citizens, families and employees in nursing homes where stealing and abuse is going on even today may now think twice before cooperating with this office.

Morris Abram, in his Moreland Commission report to the Governor, prophesied that if vigilance wasn't exercised we could face a repeat of the nursing home scandal in five or 10 years.

The sentence handed to Bernard Bergman today does little to belie the fears expressed by Mr. Abram.

New York has done more than any other state to correct its nursing home problems: Millions of dollars and vast amounts of manpower have been poured into the task of cleaning up the nursing home industry.

If all this money and effort is not to be wasted, then those who have abused the elderly and, in so doing, fashioned for themselves a life of luxury, must learn that they will go to jail for their crimes.

However, insubstantial prison sentences do not deter me. I shall continue to vigorously investigate and prosecute criminals who thrive on abuse of our elderly people.<sup>40</sup>

An editorial to the New York Times said:

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40. *Excerpts from Court Statement; Text of Prosecutor's*, N.Y. TIMES, June 18, 1976, at A24.

One of the most prominent current theories is that sentences should serve to deter others from committing similar crimes. Though this view is most regularly applied to street crime, it would seem to be substantially more applicable to white-collar criminals to whom prison is much more jarring than to criminals who live at society's economic and social margins. Yet, Mr. Bergman now joins a parade of formerly respectable white-collar criminals who have received sentences which make the odds on white-collar crime look rather good.

A second popular notion about sentencing is that it should show the criminal justice system to be even-handed. At a time when the Legislature is moving toward mandatory sentences of three years for juveniles convicted of serious crimes, a four-month sentence for a rich felon, guilty of a million-dollar fraud, can only reinforce cynicism about the realities of equal justice under law.<sup>41</sup>

On the other hand, Dean Monroe H. Freedman of Hofstra Law School defended his participation in the sentencing hearing on behalf of Bergman to angry students, stating that: "Judge Frankel did not write the opinion I had hoped for."<sup>42</sup> He called the sentence "a gross injustice," by stating that "I think Bernard Bergman should have spent no time at all."<sup>43</sup>

While not in time to save Judge Frankel from this controversy, Congress did establish the United States Sentencing Commission in 1984.<sup>44</sup> The Commission did promulgate guidelines and the age of federal guideline sentencing began. Whether guideline sentencing has achieved the dreams of Judge Frankel, or whether it is yet another "reform" gone awry is very much in dispute. The three papers that were presented at the Twenty Ninth Annual Villanova Law Review Symposium, the two notes and a comment published in this issue demonstrate that we have not yet entered into the promised land envisioned by Judge Frankel.

In his paper, Judge Stewart Dalzell vividly describes the overall

41. *Equal Justice*, N.Y. TIMES, June 18, 1976, at A22.

42. Tom Goldstein, *Dean Explains Role in Bergman Defense*, N.Y. TIMES, Sept. 2, 1976, at A35.

43. *Id.*

44. The Sentencing Reform Act created the United States Sentencing Commission as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 235, 98 Stat. 2031 (1984), amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728 (1985); Pub. L. No. 99-646, § 35, 100 Stat. 3599 (1986); Pub. L. No. 100-182, § 2, 101 Stat. 1266 (1987) (codified as amended at 18 U.S.C. § 3551 (1988)).

antipathy to the Guidelines felt by most federal District Court judges and many commentators.<sup>45</sup> Acknowledging that he is in the minority, he defends the Guidelines as greatly superior to the old regime of unbounded discretion that Frankel wished to dismantle.<sup>46</sup> However, he is not uncritical of the Guidelines, noting that the standards for non-violent drug offenses compared to violent offenses are "bizarre."<sup>47</sup> He is uncomfortable with § 5H standards which tell a judge in essence to ignore the characteristics of the person he or she is sentencing, presumably to avoid the discrimination deplored in "The Struggle for Justice" and to focus Guidelines on the crime, not the offender in line with the "just deserts" model of sentencing.<sup>48</sup> He also doubts that many offenders understand the reason for their sentences which are arrived at with the clarity and humanity of a judgment based on parsing the IRS code.<sup>49</sup> Robert Kracht's extensive Comment, "A Critical Analysis of the Proposed Sentencing Guidelines for Organizations Convicted of Environmental Crimes," examines the kind of guideline practices that give rise to this concern of Judge Dalzell.<sup>50</sup>

When speaking at the conference on "Sentencing in Pennsylvania," Judge Frankel urged the adoption of guideline sentencing to forestall mandatory sentencing.<sup>51</sup> As the reader will see in the articles by Judge Margaret Spencer<sup>52</sup> and Eric Sterling<sup>53</sup> relating to the punishment of drug offenses, this hope is far from being fulfilled. Congress has continued to impose harsh mandatory minimum sentences that the Commission has been forced to follow and the Commission has promulgated even higher minimum sentences in its Guidelines.<sup>54</sup> To no one's great surprise, Congress has responded to public outcry, rational or irrational, genuine or manu-

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45. See Dalzell, *supra* note 14, at 318.

46. *Id.* at 322-25.

47. *Id.* at 330.

48. *Id.* at 331-32.

49. *Id.* at 332-33.

50. See Robert L. Kracht, Comment, *A Critical Analysis of the Proposed Sentencing Guidelines for Organizations Convicted of Environmental Crimes*, 40 VILL. L. REV. 513 (1995).

51. SENTENCING IN PENNSYLVANIA 231-32 (Villanova University School of Law Proceedings of the Institute for Correctional Law ed., 1976).

52. See Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335 (1995).

53. See Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383 (1995).

54. The Commission has considered the mandatory minimums as a baseline and to make its own minimums meaningful, has added on to this. For a discussion of calculating sentencing from mandatory minimums as a baseline, see Spencer, *supra* note 52, at 344-45.

factured. It has displayed neither the faith nor the courage to adhere to its commitment to the procedures it established in the Sentencing Reform Act.

Judge Frankel, as quoted above, also expected that the appellate review of sentences would be instrumental in bringing order to sentencing.<sup>55</sup> Roughly, sentences with the guidelines would be presumptively reasonable while those outside the guidelines would be presumptively unreasonable. Bryant D. Lim's note, "A Retreat from Uniformity: Does Compliance with a Plea Agreement Justify Downward Departure," reviews appellate practice under the Guidelines.<sup>56</sup> Its very title indicates the heavy emphasis on uniformity as the main characteristic of a reasonable sentence.<sup>57</sup> The judge who dares to deviate cannot base his or her sentence on all the facts of the particular case, but only on those factors that could not have occurred to the Commission in constructing its intricate grids and guidelines. In most cases, this is not guiding discretion but negating discretion. This kind of sentencing is of course easier for the lazy or the timid judge because a sentence within the guidelines requires little explanation and can subject the judge to little criticism. To the discomfort of many judges, however, the Guidelines seem to offer the illusion, not the reality, of discretion and deprive them of any meaningful discretion in sentencing.

In Kerry R. Northup's note on *Nichols v. United States*,<sup>58</sup> we see a case where a judge acting within the Guidelines imposed an enhancement of over two years in sentencing a defendant who had pleaded guilty to a drug distribution offense.<sup>59</sup> The enhancement was based on a prior uncounseled misdemeanor conviction for driving under the influence of alcohol.<sup>60</sup> The case addressed the constitutional question of whether the use of such a conviction for enhancement violated the right to counsel under the sixth amendment.<sup>61</sup> Justice Souter concurred in upholding the enhancement on the grounds that it was not mandatory because under the Guide-

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55. For a discussion of Judge Frankel's view of the appellate review of sentences, see *supra* note 33 and accompanying text.

56. See Bryant D. Lim, Note, *A Retreat from Uniformity: Does Compliance with a Plea Agreement Justify Downward Departure?*, 40 VILL. L. REV. 429 (1995).

57. See *id.* at 429 n.1, 433.

58. 114 S. Ct. 1921 (1994).

59. *Id.* at 1924; see Kerry R. Northup, Note, *Nichols v. United States: Using Prior, Uncounseled Misdemeanor Convictions to Enhance Sentences — A Dispute Resolved*, 40 VILL. L. REV. 475 (1995).

60. *Nichols*, 114 S. Ct. 1921.

61. *Id.*

lines the defendant could have sought a downward departure.<sup>62</sup> Justice Blackmun, in dissent, noted the near impossibility of the defendant being able to meet the Guideline standards for downward departure.<sup>63</sup> Neither Justice commented on the fact that within the Guidelines the judge had to apply the enhancement, whether or not he thought it made sense to add more than two years to a sentence because of a prior conviction based on plea of *nolo contendere* and a \$250 fine in a DUI case.<sup>64</sup> They also did not note that, had there not been a question of constitutionality raised by the defendant, the sentence would not have been subject to any appellate review because it was within the Guidelines.<sup>65</sup> Is this the extent of control of trial court discretion under guidelines and the kind of appellate review foreseen by Judge Frankel and his followers?

As the exercise of discretion under the Guidelines becomes more limited, guideline sentences become more like mandatory sentences and are open to the same criticism that discretion has not been eliminated but shifted to the prosecutor. The prosecutor decides whether and how charges are to be brought and such decisions can vastly affect the punishments given under the Guidelines. How the prosecutor characterizes assistance from the defendant can also greatly affect the resultant sentence. The Sentencing Commission does not control prosecutors and cannot issue "Sentencing Guidelines For United States Attorneys." Was this shift of discretion from the courts to the prosecutors contemplated by those advocating Judge Frankel's reform?

Paraphrasing Churchill's oft quoted aphorism about democracy, Judge Dalzell says that guideline sentencing is the worst system of sentencing except for all the other sentencing schemes.<sup>66</sup> Some of those who were present at the beginning with Judge Frankel seriously question this opinion. If the bad old system was in effect, the sentencing judges would now be shackled with the rash of mandatory and mandatory minimum sentences enacted since the adoption of the Guidelines, but so are the courts under the Guidelines. Apart from these mandatory sentences, judges under the old

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62. *Id.* at 1930 (Souter, J., concurring).

63. *Id.* at 1934-35 (Blackmun, J., dissenting).

64. See *United States v. Nichols*, 979 F.2d 402, 405-06 (6th Cir. 1992) (noting lower court's finding that Nichols' prior conviction was based on plea of *nolo contendere* for DUI, \$250 fine and Nichols was not represented by counsel), *aff'd*, 114 S. Ct. 1921 (1994).

65. *Id.* at 406.

66. Dalzell, *supra* note 14, at 334.

system in exercising their wide discretion could offer a flexible, rational, maybe even courageous response in the current punitive climate. Under today's Guideline sentencing, this discretion has been greatly limited. We may have paid too much to reduce disparity, hurting those we attempted to help.

Others of Judge Frankel's converts have kept their faith in guideline sentencing but reject the dogma developed under the present Guidelines. The quest for uniform sentencing and the focus on the crime and not the criminal has swallowed almost all other objectives in sentencing. A guideline sentencing system, however, need not have this overwhelming emphasis. Under the Guidelines, it should be possible to make the punishment fit the crime—and fit the criminal. A guideline sentencing system does not have to create the extreme presumption that all relevant factors have been considered by the experts who made the Guidelines and thus the court may not reconsider these factors in sentencing with the result that the principal function of appellate review is to insure that this presumption is enforced. These restraints under the Guidelines betray an excessive distrust of the sentencing judge and a lack of faith in the ability of appellate courts to know and correct such errors as the trial courts might make.

"Guidelines" could be, just as the word implies, aids to the judge in sentencing, not blinders that inhibit the judge from imposing what he or she thinks is a reasonable or even a compassionate sentence. Of course, some judges might misinterpret or ignore the guidelines and others might be unreasonably lenient or unreasonably harsh. But most sentences would be well within the guidelines and given a presumption of reasonableness would seldom be appealed and, if appealed, seldom be overturned. It should be possible, however, to correct sentences even within the guidelines. In cases outside of the guidelines, the sentences would be scrutinized carefully in the light of the facts of each case and the reasons given by the judge for the sentence, giving due weight to the policies reflected in the guidelines. Appellate courts would do what they have always done in the common law, approve or disapprove lower court judgments and build precedents based on concrete cases to give further guidance to the lower courts. This is the kind of guideline sentencing envisioned by many who heard Judge Frankel's call almost twenty years ago here at Villanova University School of Law.

For those concerned with crime and punishment in America, the last twenty years have not been a happy time. The explosion of crime and the responses to this explosion have been a source of

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anguish if not despair. But as the papers in this issue illustrate, the debate goes on and the voice of reason has not been stilled. Judge Frankel's brain-child, after a rocky childhood, may yet grow into wise maturity.



